BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

No. 21, 990

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF MEMORANDUM OPINIONS AND
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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SUBJECT INDEX

TABLE OF AUTHORITIES

ases:

Cases: Page

Statutes - cont'd.

Rules and Regulations of the Federal Communications Commission, 47 CFR (1966):

Other Authorities:

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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This petition for review was filed pursuant to Section 402(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343.

The case arises from two memorandum opinions and orders of the Federal Communications Commission, released on April 14, 1967 (R. pp. 110-114) and July 14, 1967 (R. pp. 140-142), denying petitioner's request for waiver of Section 74.1103(e) of the Commission's rules dealing with the regulation of community antenna television systems, and denying reconsideration thereof. Because

petitioner's statement of the case is incomplete, it is believed the Court would be assisted by a counterstatement.

COUNTERSTATEMENT OF THE CASE

1. Background

A. The National Television Allocations Structure.

The Commission is charged with the duty of executing the policy of the Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service" (47 U.S.C. 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). In addition, the Act authorizes the Commission "to establish areas and zones to be served by any station" (47 U.S.C. 303(h)). In the television field, the Commission has sought to fulfill these responsibilities on a nationwide basis through the table of assignments contained in Section 73.606 of the rules (47 CFR 73.606). Its power to establish such an assignment plan was upheld by the Court of Appeals, Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (C.A.D.C. 1954).

The table of assignments is predicated upon the social desirability of having a large number of local outlets with diversity

of control over disseminating sources rather than a few stations serving vast areas and populations. In the Sixth Report and Order, wherein the assignment plan was adopted, 17 F.R. 3905 (1952), the Commission rejected proposals premised on the theory that channel assignments should be clustered in major population centers with smaller communities obtaining reception service solely from the larger cities rather than attempting to support a station with their own less substantial economic resources. The Commission stated (Sixth Report and Order, par. 79):

> The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs.

Thus, our commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets.

B. The Impact of Community Antenna Television Systems.

Community antenna television systems (commonly called CATV [1/] systems) originated as a supplementary service to improve

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1/ The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 CFR 74.1101(a).

reception of local television stations in areas having unfavorable reception characteristics, and to extend the signals of the nearest television stations into remote or underserved areas. These initial systems were generally successful and larger interests were thereafter attracted to CATV as a commercial venture. Channel capacity on the systems increased correspondingly from three to five to twelve channels and now a twenty channel capacity is being projected for systems in the near future. At the same time the number of CATV systems has mushroomed to more than 1,600 while the distance which signals are taken has increased to as much as 600 miles.

Because of the tremendous growth of the CATV industry, the Commission has been concerned for some time whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities,[2/] might not adversely affect the maintenance and development of the basic "free" system of television broadcasting.

The basis of this concern is that the television stations which have been established pursuant to the foregoing allocation scheme depend almost entirely on advertising revenues for income. Since the amount of revenue a station receives is related to the size of its audience, a significant reduction in the number of viewers will result in a decline in revenues. This may adversely affect the service being rendered and may even cause a station to

2/ It is not economically feasible to extend CATV service to sparsely populated outlying areas.

leave the air. By the same token unfavorable competitive conditions may inhibit the establishment of new services.

For nearly a decade the Commission has recognized that CATV systems operating in the service area of broadcast stations can have an adverse economic impact on those stations. CATV and TV Repeater Services, 26 F.C.C. 403, 421-422 (1959). The so-called Carter Mountain case provides a classic example. There, after an evidentiary hearing, the Commission found that the amount of local revenue received by station KWRB-TV, Riverton, Wyoming, from each of the major towns in its market areas was inversely proportional to the ratio of CATV subscribers to total TV homes in each town. On the basis of this and other facts as to KWRB-TV's condition as a small market station, the Commission found that the unconditional grant of an application for microwave service -- which would result in substantially improved reception of distant signals -- would probably also result in the station's demise. Accordingly, it denied the application to construct the microwave system, stating, however, that favorable action would be forthcoming if the CATV carried the local station's programs and refrained from duplicating over its system the programs carried by the local station. Upon review, the Court of Appeals held that the record "amply" supported this conclusion, noting also that the conditions specified by the Commission were entirely reasonable limitations under the public interest standard of the Communications Act. Carter Mountain Transmission Corp., 32 FCC 459, affirmed, Carter Mountain Transmission Corp. v. Federal Communications Commis-

sion, 321 F.2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963).

Beginning in 1962, the Commission instituted a series of rulemaking proceedings looking toward the regulation of CATV.[3/] These proceedings led to the adoption of the First Report and Order, 30 F.R. 6038, 38 F.C.C. 683, in 1965, and the adoption of the Second Report and Order, 31 F.R. 4540, 2 F.C.C. 2d 725, in 1966. In these proceedings the Commission carefully considered the emerging CATV industry and found that CATV is a valuable supplemental service, bringing television to areas beyond the range of broadcast stations and providing a choice of services in areas where for one reason or another only one or two signals can be received. On the other hand, it concluded that the impact on present and prospective broadcast services may be adverse and that CATVs have an unfair competitive advantage over such services which could significantly and adversely affect the public interest. Accordingly, the Commission adopted a rule requiring CATV systems to carry all local stations within whose grade B service area[4/] the system is located, and, with certain limitations, to provide nonduplication protection to the

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3/ Notice of Proposed Rule Making, Docket No. 14895, Fed. Reg. 12586 (1962); Further Notice of Proposed Rule Making, Docket No. 14895, and Notice of Proposed Rule Making, Docket No. 15233, 28 Fed. Reg. 13789 (1963); Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 15971, 30 Fed. Reg. 6078 (1965).

4/ The Grade B service area circumscribes the area within which viewers in at least 50 per cent of the locations will receive a viewable picture at least 90 per cent of the time. See Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 515-16 n. 12 (D.C. Cir. 1955). A distant station is one whose predicted Grade B contour does not include the community of the CATV. See Section 74.1105 of the rules.

local stations. Only the nonduplication rule is involved in this proceeding.[5/]

The Nonduplication Rule - The Commission found that in the nature of things the competition between CATV and the broadcaster was not inherently fair, 2 F.C.C. 2d at 778-779. A television station normally obtains the right to exhibit nonnetwork programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within the same period of time obviously reduces the audience and the value of the program to the station. The amount and kind of exclusivity that can be created is restricted by the antitrust laws, but those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process. This exclusivity is further recognized and maintained through the operation of Section 325 of the Communications Act, 47 U.S.C. 325, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

CATV systems presently stand outside this distribution process. They do not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events.

5/ Section 74.1103 and other sections of the CATV rules are appended to petitioner's brief.

They are not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier -- although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product -- the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

In the Commission's view, the carriage, from a distant station, of the same program being shown by the local facility represents a mode of competition that is inherently unfair and against the public interest. Its opinion stated (38 F.C.C. at 706)

> We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in

> the parent industry's competitive program market -- to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signal it carries.

The nonduplication rule carries out this policy. It simply requires that when the same program is being broadcast on the same day by two or more stations whose signals are received by the system, preference must be given the local station through the deletion of the more distant station's signal.

This nonduplication protection applies to "prime time" network programs (i.e., those presented by the network between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to nonduplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *."[6/] Section 74.1103(e). Finally, the CATV system need not delete reception of a network program if, in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program. Section 74.1103(g).

As to both the carriage and nonduplication rules, the Commission found that economic impact considerations supported the rules. Taking into account CATV's explosive growth, the

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6/ Under the rule, television signals are divided into four priorities in terms of signal strength: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations.

character of the markets entered, and the degree of penetration achieved, the agency found that CATV could have a substantial negative effect upon station revenues and audiences. It further found that the impact was likely to be more serious in the future than it had been in the past, 2 F.C.C. 2d at 737.

In recognition of the fact that individual stations may be faced with unusual problems, provision was made whereby a waiver of the rules could be requested under Section 74.1109. That section provides that the Commission may grant a waiver in whole or in part if it determines that the "public interest" would be served thereby. It also provides that the Commission may specify other procedures such as "oral argument" or an "evidentiary hearing"if it determines such procedures appropriate in considering the waiver request, Section 74.1109(f). Finally, the Commission stated that it would "continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local stations than do the Commission's rules." 2 F.C.C. 2d 746.

2. The Present Proceeding.

Pursuant to the new rules KVOS-TV, the only station in Bellingham, Washington, requested that petitioner discontinue the importation of programs from Seattle when KVOS-TV was carrying the same programs on its own station. Instead of honoring the request, petitioner asked the Commission to waive the rule, as it had the right to do under Section 74.1109. Petitioner's

systems serve Bellingham, Burlington, Mount Vernon, and Sedro Woolley, Washington. All are affected by the Commission's order here since they are within the local service area of KVOS-TV, Bellingham.

In support of its request for waiver, petitioner, essentially alleged that KVOS-TV's advertising revenues came mainly from Vancouver, Canada and therefore the carrying of Seattle stations on petitioner's system could not harm KVOS-TV economically. Furthermore petitioner alleged that Bellingham residents are culturally and economically tied to Seattle and not Vancouver. In a series of additional allegations, Total Telecable, alleged: (1) it should receive special consideration in its request for waiver because it originated community program services on its cable; (2) the Commission incorrectly asserted jurisdiction over CATV; (3) CATV does not amount to "unfair competition"; (4) the nonduplication rule amounts to an infringement upon petitioner's First Amendment rights; (5) a hearing should be held before §74.1103(e) is applied; and (6) in light of the copyright decision in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, the local station should indemnify petitioner for its potential copyright liability in providing the television station with exclusivity, or at least, pay petitioner's costs in implementing the exclusivity rule.

KVOS-TV, Bellingham, opposed the waiver request. It pointed out that although some of its revenue is derived from Canda, the station, as shown by the programming described in its renewal

application, served the needs and interests of its United States viewing public. KVOS-TV further stated that its network affiliation is derived from the existence of its viewing audience in the United States and that the network hourly rate is based upon the size of its United States audience.

In dismissing petitioner's waiver request, the Commission pointed to its holding in the rule making proceeding, Second Report and Order, 2 F.C.C. 2d at 736, that the nonduplication requirement rests on two basic grounds: (1) that duplication of a local station's programs is an unfair competitive practice and is inconsistent with the supplementary role of CATVs in providing service to the public and (2) that nonduplication is necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service both existing and potential. It found that petitioner's allegations that station KVOS-TV received much of its advertising revenues from Canada and that petitioner originated public service programming of its own were largely irrelevant to the question of waiving the rules, and that petitioner had failed to show a basis for the special relief it sought.

The Commission reiterated its belief "that same-day program exclusivity would not have an unduly disruptive effect on CATV service," and concluded that Total Telecable had failed "to point to any special circumstances which would warrant a departure from this view." Although petitioner had asked for a hearing the

Commission noted the "threshold factual allegations do not persuade us that a hearing is necessary."

On April 21, 1967, Total Telecable filed a Petition for Reconsideration. Reconsideration was sought because, petitioner argued, the Commission "accorded insufficent weight" to its claim that KVOS-TV relied on Vancouver, Canada for its revenues, and petitioner had not been given the same procedural protection that would be given to a broadcast licensee.

The Commission rejected petitioner's first argument "on the ground that the reasons underlying the program exclusivity requirement, as stated in the Second Report and Order, do not rely on such considerations as the location of the major portion of a television station's audience or revenue sources." As to the need for a hearing, it pointed out that its rules provided for hearings where they appear justified --"but petitioner's arguments have not persuaded us that a hearing is required in its case. United States v. Storer Broadcasting Company, 351 U.S. 192."

This appeal followed. On September 7, 1967, the Court denied petitioner's request for a stay of the Commission's orders, but later provided for expedited consideration of the merits.

QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether the Communications Act gives the Commission the authority it has asserted over community antenna television systems.

2. Whether the Commission properly declined to hold a hearing on petitioner's request that it be exempted from the obligation to comply with the nonduplication rule.

3. Whether the nonduplication rule unconstitutionally restricts petitioner's right of free speech.

SUMMARY OF ARGUMENT

The Commission has exercised limited jurisdiction over CATV systems to insure that they will be of value as a supplement to the television broadcast service whose signals they use, without destroying the basic allocation scheme of "free" television service. CATV systems are engaged in communication by wire in interstate commerce, to which the Communications Act is specifically made applicable. They are also a practical extension of the service of television stations. We submit that the holding of Regents v. Carroll, 338 U.S. 586 (1950), relied upon by petitioner as dispositive of the jurisdictional question, is limited to the factual situation presented there and that Regents does not resolve the question of the Commission's jurisdiction over an entity engaged in interstate communication by wire.

Since the Commission has the authority to make all rules

necessary to the execution of its functions, National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and to carry out the provisions of the Communications Act it could provide by rule for non-duplication protection and the proper procedure for waiver. In this case, the petitioner's obligation to comply with the provisions of Section 74.1103, 47 CFR 74.1103, is rooted in the promulgation of the rule in a valid rule making proceeding. Petitioner had every opportunity to participate in this proceeding; it was not entitled to a hearing nor was it deprived of any constitutional rights of due process of law.

Petitioner sought waiver of a rule which represents a settled determination of where the public interest lies. Its waiver request simply failed to set forth reasons, sufficient if true, to override the policy decisions underlying the promulgation of the nonduplication rule.

Finally, the Commission's rules do not violate the constitutional protection of free speech. Rather, they constitute a reasonable regulation of the use by CATV systems of radio signals.

ARGUMENT

I. THE COMMUNICATIONS ACT GIVES THE COMMISSION THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY ANTENNA TELEVISION SYSTEMS.

Petitioner's chief contention is that the Commission has no jurisdiction over CATV systems. Its argument relies in particular on this Court's holding in Southwestern Cable Co. v. United States, 378 F.2d 118 (1967),[7/] that the Commission's authority "was exercisable only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency. In reaching its decision, the Court relied largely on language in Regents v. Carroll, 338 U.S. 586 (1950), wherein the Supreme Court observed that the Commission's "powers center around the grant of licenses."

More recently, the Court of Appeals for the District of Columbia Circuit upheld the Commission's jurisdiction over CATV. Buckeye Cablevision, Inc. v. Federal Communications Commission, ___ F.2d ___, decided June 30, 1967. The Court concluded that CATV, "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

We have requested the Supreme Court to review the Southwestern decision, contending that it erroneously decides a new

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7/ Earlier in this proceeding, petitioner took the position that Southwestern did not decide the jurisdictional question. See Motion for Accelerated Review filed on September 15, 1967.

and important question of law and that it is in conflict with the decision of another circuit.[8/] In this brief we attempt to show that the Regents case is not dispositive of the jurisdictional question and that the Communications Act, as the Court in Buckeye found, confers on the Commission the power to regulate CATVs.

A. Regents v. Carroll, Which Involved A Contractual Dispute Between A Broadcast Licensee And A Third Party, Does Not Resolve The Question Of The Commission's Jurisdiction Over An Entity Engaged In Interstate Communication By Wire, An Activity Expressly Subject To The Commission's Regulatory Authority.

In its Southwestern opinion, this Court stated that its decision was guided by the language of the Supreme Court in Regents v. Carroll, that "the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license that the Commission may apply to enforce its decisions" 338 U.S. at 597-599. In that case the Commission granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the Commission had invalidated the contract.

8/ If the Supreme Court should grant our petition for certiorari, it is our view that this proceeding should be held in abeyance pending a decision on the merits. Such decision would presumably resolve the principal issue here and might render the entire proceeding moot.

The issue in the case was stated thusly by the Court: "whether in the light of the Supremacy Clause of the Constitution a state may enter a judgment that grants respondents a recovery on the very stock purchase contract that justified the Commission's refusal of a license." As it had on earlier occasions, 9/ the Court noted that the Communications Act does not give the Commission the authority to adjudicate private controversies. It found that the Commission had no power to "act as a bankruptcy court" or to determine the validity of contracts between licensees and others. Id. 602. And accordingly it concluded that the state court's judgment did not contravene the Supremacy Clause.

It is in this context that the discussion of the Commission's powers took place. Unlike CATVs, the other party to the contract in Regents was not a person engaged in interstate communication by wire and radio. As we show in the following section of our brief, the Act applies to all such communications and the Commission was expressly created to regulate such activity. For this reason we respectfully urge that Regents v. Carroll is not controlling, and that the better view of that case is the one taken by the District of Columbia Circuit in Buckeye:

> In Carroll, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" around its licensing power which does not encompass abridgment of contracts between licensees and third parties. But the Court's view of this limitation was based largely on

9/ See e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138.

> the agency's lack of authority at the time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority, [47 U.S.C. 312(b)(c)] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which Carroll may still be viable since we think that in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire scheme. [Footnote omitted.]

The CATV industry is indisputably part of the nation's communications system. This is a field in which Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation." It did so because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943).

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), Philadelphia Broadcasting Co. v. Federal Communications Commission, 359 F.2d 282, 284 (C.A.D.C. 1966).

To hold that Regents v. Carroll is dispositive of the jurisdictional question is in one view to read that case too broadly. In the following section of our brief we discuss those sections of the Communications Act on which the Commission relies for its claimed jurisdiction and which were accepted by the District of Columbia Circuit.[10/] We believe that construed in light of National Broadcasting Co. and Pottsville, supra, these statutory provisions confer on the agency the jurisdiction asserted.

B. Since CATV Systems Are Engaged In Interstate Communication By Wire Or Radio, They Fall Within The Ambit Of The Commission's Regulatory Authority.

The Communications Act directs the Commission to provide "a rapid, efficient, Nation-wide and worldwide wire and radio communication service * * *," 47 U.S.C. §151. It applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio. * * *" 47 U.S.C. §152. To achieve the goals of the Act, the Commission is directed inter alia, to establish "areas or zones to be served by any [broadcast] station" 47 U.S.C. §303(h), to issue broadcast licenses to "provide a fair, efficient, and equitable distribution of radio service" to the states and communities of the United States, 47 U.S.C. §307(b), and to promulgate rules and regulations to effectuate its responsibilities, 47 U.S.C. §§154(i), 303(f), (r).

10/ A fuller discussion of the authorities supporting the Commissio assertion of jurisdiction is appended to the Second Report and Orde 2 F.C.C. 2d at 793-797.

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the service offered, it is clear that CATVs are engaged in communication by wire within the meaning of the Act. And see also 47 U.S.C. 153(b) which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission."

It is clear also that CATVs engage in interstate transmissions under Section 3(e). This is so because the transmission of a television station is in interstate commerce, Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936). And the extension of such an interstate communication by a CATV is part of the interstate transmission, even though the extension itself be entirely within one State. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra; Idaho Microwave, Inc. v. Federal Communications Commission, 352 F.2d 729 (C.A.D.C. 1965); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (C.A. 6, 1962), cert. den., 371 U.S. 820.

Petitioner argues that the Commission's view of CATV as a link in the transmission of television signals to the public is fundamentally wrong and that CATVs, instead, are merely devices for the reception of signals, differing in no significant way from ordinary home antennas. But, in fact, CATVs are substantially more than passive receivers; they are elaborate distribution systems whereby signals may be carried hundreds of miles beyond their point of origin and delivered to subscribers far beyond the normal range or service area of the stations involved.

The argument that CATV systems are simply "master antennas" was considered by the Commission in its CATV rule making proceeding and found to be at odds with any realistic accessment of the actual functions of a CATV system.[11/] This finding is in accord with court holdings in which the question has been considered. Thus in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C.S.D. N.Y. 1966), affirmed, Fortnightly v. United Artists, 377 F.2d 872 (C.A. 2, 1967),

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11/ There the Commission stated, 2 F.C.C. 2d at 780:

> A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signal.

an action for infringement of copyright, the Court stated:

> The term "community antenna," as used by defendants for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs--operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas. 255 F. Supp. at 180.

Likewise, the Court of Appeals in the Buckeye case described the system there as one which "receives programs which originate outside the state and retransmits them by cable to its customers" (Slip Op. p. 8, emphasis added.) 12/

Thus, in practical effect as well as in legal contemplation, CATV systems are a part of the transmission of the television signal to the public. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States,

12/ See also Idaho Microwave, Inc. v. Federal Communications Commission, supra, and Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 517 (C.A.D.C. 1955).

319 U.S. 190, 217 (1943), the Commission clearly has the authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).[13/]

Petitioner contends that the Commission has two principal and separate functions--to regulate communications common carriers and to license radio stations--and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate. The Communications Act expressly states that its provisions "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *," 47 U.S.C. §152(a). Congress did not provide that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," amd there is no reason to imply such an intent. If

13/ This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d, p. 3 (1962). Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Repo

Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

Moreover, Congress stated in Section 1 of the Act, 47 U.S.C. 151, that its intent was not only to "centralize authority heretofore granted" to other agencies but also to grant "additional authority with respect to interstate commerce in wire and radio communication." This change in the law was for the purpose of "securing a more effective execution" of national communications policy. Thus the avowed intendment of the Act as expressly stated in Section 1 negates petitioner's argument that the only accomplishment of the legislation was to consolidate the common carrier functions of the Interstate Commerce Commission and the licensing function of the Federal Radio Commission. Under the circumstances, petitioner's resort to legislative history[14/] to establish a different view is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 278 U.S. 269 (1929); Elm City Broadcasting Co. v. United States, 235 F.2d 811 (C.A.D.C. 1956).

But even if the statute were not so clear, the legislative history on which petitioner relies is not persuasive. While it is true that the Senate version of the Communications Act would have divided the new Commission into divisions, the Radio Division and the Telephone and Telegraph Division, the House Committee rejected this approach because these divisions would function

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14/ Total Telecable's Br. pp. 23-25.

practically as separate Commissions without their action being subject to review by the full Commission. H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2 (1934). The bill as finally enacted did not include this sharp functional division of the Commission's powers. Instead, the Act is a comprehensive scheme for the regulation of interstate communication and constituted "the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication. The primary purpose of the Act was to create a commission 'to regulate all forms of communication * * *'" H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3.355 H.S. at 104 n. 14. The legislative history, like the language of the Act itself, demonstrates that Congress intended not merely to effect a reshuffling of two regulatory activities to place them under one authority for administrative purposes, but rather, to establish a cohesiveness and uniformity in the handling of all interstate communications matters which had until that time been lacking.

In affirming the Commission's jurisdiction over CATVs, the Court of Appeals for the District of Columbia relied on the expressed objectives of the Communications Act and the specific mandate given therein to the Commission. In addition, it acknowledged the soundness of the Commission's conclusion that further unregulated growth of CATV represents a substantial economic threat to licensed television stations and to the allocations system established by the Commission. And finally it pointed

to the substantial body of case law, both in the communications field and in other areas, which recognizes the implied authority of the expert agency to deal with aligned activities affecting the regulatory scheme and grants to it sufficient latitude to cope with new developments in the industry it was established to regulate.[15/] The Southwestern opinion did not address itself to any of these considerations since the Court in that case felt that Regents v. Carroll was dispositive. We respectfully urge that with due regard for the language in that case the weight of authority, both statutory and judicial, supports the Commission's assertion of jurisdiction.

15/ See e.g., National Broadcasting Co. v. United States, supra; American Trucking Assoc. v. United States, 344 U.S. 298 (1953); Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153 (C.A.D.C. 1967).

II. THE COMMISSION PROPERLY DECLINED TO HOLD A HEARING ON PETITIONER'S REQUEST THAT IT BE EXEMPTED FROM THE OBLIGATION TO COMPLY WITH THE NONDUPLICATION RULE.

Petitioner argues (Br. pp. 41-45) that it was entitled to a hearing before its long standing business practices were modified and that it had presented substantial and material questions of fact in its petition for waiver. We believe petitioner errs on bot counts. But before addressing ourselves specifically to these contentions we think it useful to define at the outset the scope of th Commission's order.

The order is not, as petitioner argues, a "cease and desi order" under Section 312 of the Communications Act, 47 U.S.C. 312. Pursuant to that section, the Commission may issue such orders to any person failing "to observe any rule or regulation of the Commission" authorized under the Act. They may be entered only aft a hearing in which the person involved has been afforded an opportunity to show cause why the order should not be issued. And the proceedings are reviewable only in the Court of Appeals for the District of Columbia Circuit, 47 U.S.C. 402(b)(7).[16/]

Here the Commission did not purport to act under Section 312, nor would it have been appropriate to do so since no violation of the rule had yet occurred.[17/] It simply had before it a petitio

16/ Buckeye Cablevision, Inc. v. Federal Communications Commission supra, involves review of such an order.

17/ The nonduplication rule generally becomes operative when the local station requests exclusivity from the cable operator. However, upon receipt of this request, the CATV system may petition the Commission to waive the rule. A petition for waiver operates to stay compliance pending a determination of the merits of the waiver petition. Hence, the necessity for including a clause fixing the date for compliance in any order denying a petition for waiver.

for waiver of one of its rules filed by petitioner.

The waiver procedure is set forth in considerable detail in Section 74.1109 of the rules and the Commission's action was taken pursuant to and in accordance with the procedures specified therein. See also 5 U.S.C. 555(d), which provides that prompt notice with "a simple statement of . . . grounds" shall be given with respect to the denial of any petition.

While the Commission's order contained a clause directing petitioner to comply with the rule within thirty days, that clause was inserted only to give petitioner notice of a date certain when it would be expected to be in compliance with the rule;[18/] aside from this the ordering clause added nothing to the obligation imposed on petitioner. Once its request for special relief was denied, it was the rule itself, adopted after proceedings in which petitioner had a full opportunity to participate, that compelled the conduct at issue here.

As to the impact of this ruling on petitioner's systems, each of these systems has a twelve channel capacity and currently receives signals from ten stations (four from Seattle, three from Tacoma, two from Vancouver, Canada, and the Bellingham Station). In addition, petitioner itself originates some programming for carriage on the other channels. Under the rules, petitioner may continue carrying nine of the ten stations as it has always done. The Commission's order requires only that petitioner refrain from showing during prime time the programs of Seattle station KIRO-TV[19/]

18/ In its form the order is typical of Commission orders denying similar waiver requests. See Lee County TV Cable Company, 5 F.C.C. 2d 707 (1966); Consolidated TV Cable Service, 7 F.C.C. 2d 886 (1967); Mountain State Cable, Inc. 8 F.C.C. 2d 315 (1967); and Douglas Antenna Cable TV, 8 F.C.C. 2d 317 (1967).

when those programs are also being carried that day on the local Bellingham station. In other words, petitioner's subscribers are being denied not a single program they have been receiving. Under the circumstances we submit that petitioner's repeated assertions that a long-established business faces ruin as a result of the Commission's action are gross exaggerations bearing no relation to the actual facts and that, on the contrary, the effect of the Commission's action is clearly minimal insofar as petitioner's enterprise is concerned.

We turn now to petitioner's claim that an evidentiary hearing should have been held, considering first the contention that a hearing is required by statute before changes in an existing operation can be affected; secondly, that without a hearing the rules violate due process requirements; and finally that a hearing should have been held on the request for waiver.

A. Where General Rules Applicable To A Broad Class Of Persons Are Adopted In Accordance With Prescribed Rule Making Procedures, The Commission Is Not Required By Statute To Hold Separate Adjudicatory Hearings Before The Rules Can Become Effective.

As we have detailed in our counterstatement, the non-duplication rule was originally adopted in a rulemaking proceeding in which all interested parties were permitted to participate. See First Report and Order, 30 F.R. 6038, 38 F.C.C. 683 (1965) in which the rule was restricted to microwave fed CATV systems. After further proceedings in which notice and opportunity to comment were given to interested parties, the rule was extended to cover both

microwave and off the air CATV systems, but was reduced in its operation from a 15 day duplication ban, to a prohibition of duplication within a 24 hour period. Second Report and Order, 31 F.R. 4540, 2 F.C.C. 2d 725 (1966). Petitioner alleges no procedural irregularities with respect to the rule making and the Court of Appeals for the District of Columbia Circuit has expressly held that the proceeding was conducted in accordance with the Administrative Procedure Act. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra.

Petitioner's argument that further proceedings are necessary because the rules modify long-standing business practices is not persuasive. Most rules do require a change in existing practices of the affected parties, see e.g. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Metropolitan Television Co. v. Federal Communications Commission, 289 F.2d 874 (C.A.D.C., 1961) But the applicable statute, 5 U.S.C. 553(c), provides that in the normal course such rules may become effective thirty days after publication. The cases cited by petitioner, Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316 (1961), and Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (C.A.D.C., 1949), are not to the contrary. Delta arose in the context of a licensing situation and did not involve a rule at all; the case turned solely on the question of the Board's power to alter a carrier's certificate after it had been issued and become effective but while petitions for reconsideration were pending. Likewise, Standard

concerned an individual licensing action in which the Board without notice or hearing suspended the registration of an air carrier. Neither case concerned in any way the power of an agency without adjudicatory proceedings to adopt and effectuate rules applicable to a broad class of persons. In cases raising such an issue the courts have invariably sustained the agency's authority even where existing statutes afforded individual parties a hearing before existing rights could be changed.

Thus, in American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 843, the Civil Aeronautics Board promulgated a new regulation which denied without individual adjudicatory hearings, certain freight rights previously available to many carriers under their then outstanding certificates. The court held, however, that since the regulation was legitimately general in effect, and adopted in a fully adequate rule making, it could be applied so as to deprive outstanding certificate holders of pre-existing rights, even though the Federal Aviation Act (49 U.S.C. section 1371(g)) provided that outstanding certificates could not be modified without individual adjudicatory hearings.

This Circuit has recently applied the logic of American Airlines specifically to the radio licensing field. See California Citizens Band Assoc., Inc. v. United States, 375 F.2d 43 (9th Cir., 1967) cert. denied 36 US L. Week 3130. In that case this Court held that midterm changes of existing operating privileges were entirely lega

notwithstanding section 316 of the Act. The court stated:

> Similarly in the case before us it is apparent from a reading of the statute that its primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee. We therefore hold that the general rule making procedure followed by the Commission was not violative of section 316 of the Act. 20/ 375 F.2d at 52.

The situation here is similar to that approved in American Airlines and California Citizens Band. The obligation of petitioner to comply with the provisions of section 74.1103 is rooted in the promulgation of the rule in a valid rulemaking proceeding. Accordingly, all of the statutory references in petitioner's argument (Br. pp. 41-45) to adjudicatory rights are inappropriate because they are addressed to situations in which individual licensees are, in effect, singled out for unique treatment. Here, on the contrary, the rule applies to all CATV systems coming within its terms.

20/ See also Federal Power Commission v. Texaco, 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Airline Pilots Association, International v. Quesada, 276 F.2d 892 (C.A. 2, 1960).

B. Denial Of A Hearing Did Not Deprive Petitioner Of Due Process Of Law, Nor Is It A Taking Of Property.

Petitioner argues (Br., pp. 28-31) that aside from statutor requirements denial of a hearing in this case deprived it of due process of law since the issuance of the order to comply with the rules will deprive petitioner of the full use of its property.

As we have discussed above, the nonduplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance. Petitioner's argument as to deprivation of property was disposed of as long ago as 1932 in connection with the functions of the Radio Commission At that time in Trinity Methodist Church South v. Federal Radio Commission, 62 F 2d 850, 852 (C.A.D.C. 1932), cert. den. 288 U.S. 599, the Court, citing Chicago B. & Q. R. Co. v. Illinois, 200 U.S. 561, 593, stated:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution.
> . . .
>
> When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects

> of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law" Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558. Cf. Reinman v. Little Rock, 237 U.S. 171 (1915); Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

And as the Supreme Court stated in Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 282 (1933):

> * * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Thus, assuming that the Commission's promulgation of its CATV rules was a proper exercise of its statutory authority, their operation does not invade those rights of petitioners protected by Constitutional guarantees.

Petitioner argues (Br. 41-45) that it was entitled to a hearing before it could be deprived of any use of its property. However, the law is well settled that individuals subject to governmental regulation may constitutionally be deprived of certain property rights without an individual adjudicatory hearing where the deprivation is the result of a valid rulemaking proceeding. In Airline Pilots Association, Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960), the court was faced with an argument similar

to that made here. In that case the Federal Aviation administrator had promulgated after a rulemaking only, a new rule barring individuals over 60 years old from serving as pilots. Many pilots were thereby deprived not only of a portion of their business investment, but rather of their basic livelihood. Said the Court:

> Nor does the regulation violate due process because it modified pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. * * * Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicatory hearings including appeals to the courts, and each pilot whose license was affected -- here some 18,000-- might demand to be heard individually. 276 F.2d at 896.

Since petitioner had every procedural opportunity to which it was entitled in a valid rulemaking proceeding, it was not deprived of any constitutional rights of due process of law. Bi-Metallic Investment Co. v. State Board, 239 U.S. 441, 445 (1915); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied 338 U.S. 860.

C. Since Petitioner's Request For A Waiver Did Not Set Forth Allegations Sufficient If True To Warrant An Exemption, No Hearing Was Required.

Petitioner next argues that aside from whether a hearing was required before the rules could be implemented, it was entitled to a hearing on its request for waiver (Br. pp. 45-49, 51-53). In United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Supreme Court upheld the Commission's refusal to accept an application requesting facilities which the Commission had already determined in a rule making were not available. In so doing, the Court indicated what function the waiver route should play in situations in which the action requested by the applicant is plainly interdicted by the rules:

> As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing. 351 U.S. 192, at 205.

See also Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964). Section 74.1109(c)(1), 47 CFR 74.1109(c)(1), providing for a waiver, specifies that the showing must be substantial:

> The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

In a recent CATV case involving waiver of a section of the rules (not involved here), which required hearings before certain signals could be carried by CATVs, the District of Columbia Court of Appeals has observed that waiver petitions must meet a high evidentiary standard: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the proof . . . ." Channel 9 Syracuse, Inc. v. Federal Communications Commission, D.C. Cir., Case No. 20,843, decided September 26, 1967, Slip Op., p. 12. And see Cedar Rapids Television Co. v. Federal Communications Commission, D.C. Cir., Case No. 20,783, decided September 27, 1967, Slip Op., p. 7. In the present case, we note, waiver is being sought not of a hearing requirement, but of a rule which represents a settled determination as to where the public interest lies.

Measured against these standards the request for waiver made by petitioner was entirely inadequate. It simply failed to set forth reasons, sufficient if true, to override the policy decisions underlying the promulgation of the nonduplication rule. Thus, petitioner argues in its brief (pp. 46-47) that (1) the local station would not be hurt since it derived much of its revenue from communities in Canada where petitioner's systems do not operate; (2) that the non-duplication rule would be disruptive and result in a loss of business; and (3) that its own local service was more in the public interest. Its brief, like its petition

for waiver, sets forth nothing more than a bare assertion with respect to each of these and is hardly the kind of showing that would warrant departure from an important, carefully-considered substantive rule.

With respect to the merit of petitioner's own program originations, the Commission's action in no way precludes or inhibits whatever petitioner has been doing in this regard. Thus, it is difficult to understand what purpose would be served by a hearing on this point. Moreover, this service is available only to subscribers who of course must pay a monthly charge. It is no substitute for a broadcast service which may be viewed free of charge by any member of the public in the area who possesses a television receiver.[21/] Thus, a hearing to examine the manner in which the CATV's locally originated material serves the public interest is simply not relevant to the waiver issue.

Likewise, the allegation of disruption in the service provided is hardly consequential. As we have shown, the disruption here is minimal, involving only the requirement that the viewer turn his channel selector from KIRO-TV to KVOS-TV if he wishes to view a program formerly carried by both. The Commission was aware that

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21/ In 1962 Congress underscored the nation's commitment to local broadcast service in enacting the so-called "all-channel receiver legislation, 47 U.S.C. 303(s). Among other things the purpose of the legislation was to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." H. Rep. 1559, 87th Cong., 2d Sess. p. 3. See also 47 U.S.C. 307(b).

certain aspects of the rules would bring about significant changes in existing service and as to these, in order to avoid disruption, "grandfather" provisions were enacted exempting long established systems like petitioner's.[22] See e.g., 2 F.C.C. 2d at 784-786. We submit, however, that it borders on the frivolous to argue that a hearing was needed to explore the impact of the changes required here. It is indeed difficult to imagine a situation where the impact of the rules on a system and its subscribers is less burdensome than is the case here.

The contention that an exemption was warranted because most of the television station's audience and advertising revenue derives from areas not served by the CATV is nothing more than an attempt to relitigate the questions decided in the rule making.[23] Considering not only past and present situations but future trends as well, the Commission emphasized that it was the latter primarily which called for the adoption of the rules:

> [W]e believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and

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22/ Thus petitioner, having commenced operation prior to February 15, 1966, is not subject to Section 74.1107, the so-called distant signal rule.

23/ The petitioner's argument that Station KVOS-TV derives revenue from the viewing of its programs in Canada does not detract from its need for non-duplication protection. As KVOS-TV pointed out, KVOS-TV viability as a local station providing for the public interest in Bellingham, Washington, depends upon its network affiliation and the network hourly rate for advertising, both of which are based upon its viewing audience in the United States. Thus any fragmentation of its United States audience directly affects its existence as a local station serving the Bellingham area.

> potential. NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. . . . This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service. 38 F.C.C. 713-714.

Indeed it is frequently true that individual systems serving a limited number of subscribers pose no immediate threat to a station's viability. But it would be folly for the Commission to fragment the problem this way. Where, as the Commission found with respect to CATV, growth was occurring at a rapid rate and a potential for harm was shown, the fact that a particular system might show that its operation poses no immediate threat to an existing station is hardly sufficient to warrant an exemption. This is particularly so where the agency has concluded that duplication by a CATV of programs the local station has bargained for to obtain exclusivity rights is inherently unfair.

The adoption of the CATV rules was the culmination of a most intensive administrative study of the interrelation between

broadcasting and CATV service. Three separate quasi-legislative proceedings have been conducted[25] and experience and knowledge have been accumulated on a case to case basis as well.[26] The nature of the conflict and the considerations at stake were discussed in great detail in the opinions under review in this proceeding and have been outlined in the preceding paragraphs. The Commission has found that CATV is a valuable supplemental service, bringing television to areas beyond the range of broadcast stations and providing a choice of services in areas where for one reason or another only one or two signals can be received. On the other hand, it has concluded that the impact on present and prospective broadcast services may be adverse and that CATVs have an unfair competitiv advantage over such services which could significantly and adversely affect the public interest. The rules strike a balance between the interests of the CATV system and the broadcast stations which at the same time serves the overriding public interest in the advancemer of a nationwide broadcast service. To require that before they may be implemented, an ad hoc examination of the economics of each situation must be conducted at the request of an affected system would fatally impair the effectiveness of the rules.

25/ CATV and TV Repeater Services, supra; First Report and Order, supra; Second Report and Order, supra.
26/ Carter Mountain Transmission Corp., 32 F.C.C. 459 (1963); Black Hills Video Corp., 5 Pike and Fischer, RR 2d 612 (1965); Collier Electric Co., 2 Pike and Fischer, RR 2d 675 (1964).

III. THE NONDUPLICATION RULE DOES NOT UNCONSTITUTIONALLY RESTRICT PETITIONER'S RIGHT OF FREE SPEECH.

Total Telecable contends that the CATV rules infringe upon its right of free speech in contravention of Section 326[27/] of the Communications Act and the First Amendment of the Constitution. Petitioner's argument is premised on the ground that Section 74.1103(e) inhibits the distribution of Constitutionally protected material. We believe it is clear that no such violation exists. In National Broadcasting Co. v. United States, 319 U.S. 192 (1943), the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment.[28/] That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end, Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and

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27/ Section 326 states ". . . no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

28/ See also California Citizens Band Assoc. v. United States, 375 F.2d 43 (9th Cir., 1967); Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2 C.A. 1965).

engineering impediments to the 'larger and more effective use of radio in the public interest.'" (319 U.S. at 217). The Court concluded that (319 U.S. at 227):

> * * * The right of free speech does not include however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

If, as we urge, the Commission has been granted the authority by Congress to limit the duplication of local television signals through the importation of distant signals, the National Broadcasting Co. case makes clear that such a limitation raises no substantial free speech question. CATV systems constitute a part of the scheme of television distribution, which unlike any other modes of expression, make use of radio signals as a sine qua non of their operation. Thus in essence the CATV regulations, like the network rules at issue in the N.B.C. case, are another aspect of regulation of the use of the airwaves.

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air wave in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon,

and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

Petitioner does not dispute the reasonableness of the nonduplication rule. Its free speech argument is devoted to a discussion in the abstract of cases involving wholly different media. With respect to the kind of regulations at issue here, however, the courts have consistently upheld their validity against challenges that First Amendment rights were being infringed. In the Carter Mountain case the court rejected the argument that nonduplication requirements constituted an improper restraint on free speech, stating that "protection of the public interest does not amount to 'censorship,'" 321 F.2d at 364. Similarly in Buckeye the court observed (Slip Op. pp. 8-9):

> It is true that CATV systems disseminate programs carrying a wide range of information. But we think the restraint imposed by the rules is not more than is reasonably required to effectuate the public interest requirements of the Act.

It is important to point out, in conclusion, that the Commission's rules contain no restrictions of any sort on petitioners' right to originate their own programs. No expressions by petitioners are involved. Petitioners are restricted only in the use they make of signals broadcast by others. For this reason, Weaver v. Jordan, 49 Cal. Rep. 537, 411 P.2d 289 (1966), cert. den. 385 U.S. 844, is not in point. In that case, the Supreme Court of California struck

down, as inconsistent with the First Amendment, as absolute prohibition against the origination of programs by a wire Pay-TV system, and the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That case is plainly distinguishable in view of the limited regulation embodied in the Commission's CATV rules.

In sum, the regulation of the air waves is an exercise of the commerce power. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 279 (1933) and Congress may subject their use to reasonable regulation in the public interest, whether the use of radio signals be made by radio and television stations or by CATV systems. Such regulation which, as we have shown above, is reasonably related to valid objectives, is not an infringement upon the rights of free speech of either the CATV system operator or the viewing public.

CONCLUSION

For the reasons stated, the Commission's action should be affirmed.

Respectfully submitted,

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October 23, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward J. Kuhlmann